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No. 92-1772

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1992

BROUGHTON LUMBER CO.,

Petitioner,

v.

COLUMBIA RIVER GORGE
COMMISSION, et al.,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This case presents novel and important issues worthy of this Court's review: At a time when interstate compact agencies are proliferating as instruments of regional resource management, what is the susceptibility of such agencies to federal court jurisdiction?

In its opposition to certiorari, the respondent Columbia River Gorge Commission attempts to deflect the Court's interest through a variety of devices, ranging from a suggestion of "mootness" (albeit in a footnote), to denigration of the underlying controversy as "simply a request for review of a land use decision," to an inaccurate description of the legislative history of the operative jurisdictional provisions of the Columbia River Gorge National Scenic Area Act.

Each of these devices should be dispelled. Briefly:

(1) The Commission's suggestion of "mootness" is utterly unsupported by the record. Indeed, that footnoted suggestion (See Brief in Opposition at 9 n.5) does not include a single reference to the record.

If, however, this Court elects to consider matters outside the record, the suggestion of "mootness" is demonstrably false. Contrary to respondent's assertion, the Commission has never "approved petitioner's proposal for a commercial resort on the same property that is the subject of this case." (Indeed, if such approval had issued, petitioner long ago would have devoted its resources to working its land, rather than pursuing the Gorge Commission from Yakima, to San Francisco, to Washington, D.C.) Rather, the Commission's action to which respondent refers: (1) focused on a neighboring parcel, only marginally overlapping the subject parcel; (2) in no way permitted the residential

construction which Braughton Lumber sought, and seeks; and (3) in any event, was never built.

Nor have the underlying land use guidelines been succeeded by county ordinance--and there is no way of knowing when, if ever, Skamania County would adopt such an ordinance. In any event, the Commission does not--indeed, cannot--assert that any ordinance would materially deviate from existing guidelines.

(2) This case, in this Court, is not about "land use," but about jurisdiction. Whatever the underlying substantive claim, the focus in this Court (as in the Ninth Circuit) was on the Gorge Commission's susceptibility to federal court jurisdiction, either generally via federal question jurisdiction, or specifically via the Gorge Act's concurrent jurisdiction provisions. See 16 U.S.C. § 544m(b)(4).

These jurisdictional issues are universal, not specific. They arise anytime a party seeks injunctive or declaratory relief against an interstate compact agency--and, thus,

transcend the "land use" particulars of Broughton Lumber Co.'s claims against the Columbia River Gorge Commission.

(3) Finally, the respondent Gorge Commission trumpets that the Gorge Act provides for state court jurisdiction over the Commission. See Brief in Opposition at 20-22. This is a non sequitur. Of course, the Act provides for such jurisdiction; petitioner has never argued otherwise.

But just as clearly, the Act provides for concurrent federal court jurisdiction over the Gorge Commission. See 16 U.S.C. § 544m(b)(4). It is this explicit concurrency that the Commission ignores. Neither the Commission, nor the Ninth Circuit, has ever offered a plausible construction of § 544(m)(b)(4) that would give that provision substance without conferring federal jurisdiction.

Rather than confronting the inescapable concurrent jurisdiction consequences of § 544(m)(b)(4), the Commission distorts the legislative history of the Gorge Act's jurisdictional

provisions. See Brief in Opposition at 20-21. Specifically, the Commission asserts that congressional rejection of "an attempt by Representative Robert Smith to amend the judicial review section in the House to provide federal court jurisdiction" is proof positive that Congress intended to confer exclusive jurisdiction in the courts of Oregon and Washington to adjudicate disputes involving the Gorge Commission. Id.

In reality, congressional rejection of Representative Smith's amendment confirmed concurrent jurisdiction. Representative Smith sought to amend the Gorge Act to provide for exclusive federal jurisdiction and venue:

> The courts of the United States shall have exclusive jurisdiction of actions arising under this Act, and venue shall be in the United States District Courts for Washington or Oregon.

132 Cong. Rec. ¶ 11, 139 (daily ed. Oct. 16, 1986). Thus, by rejecting this proposal, Congress merely reiterated its commitment to concurrent jurisdiction, as embodied in § 544m(b)(4).

CONCLUSION

Because this case raises exceptionally important questions of federal jurisdiction over interstate compact agencies, petitioner respectfully requests that the Court grant the petition for writ of certiorari.

Respectfully submitted this 31st day of August, 1993.

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